STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 96B012

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID VAN DYKE,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
REGENTS OF THE UNIVERSITY OF COLORADO,
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

The hearing was held on December 12, 1995, and January 8, April 9, and May 6, 1996, in Denver before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at hearing through Elvira Strehle Henson, assistant university counsel. Complainant, David Van Dyke, appeared at the hearing pro se.

Respondent called the following employees of the University of Colorado at Boulder as witnesses to testify at hearing: Mansour Alipour-Fard; Michael Yonkers; Jane Bahry; Christina Valdez; Michael Morrison; Denise Donnelly; Richard Siani; Kathy Mitchell; Doretta Hultquist; Azmi Imad; and William Herbstreit. Respondent also called Officer Madrid of the City of Boulder Police Department to testify at hearing.

Complainant testified in his own behalf and called the following employees of the University of Colorado at Boulder to testify at hearing: Rollin Garenson; William Herbstreit; Susan Riggs; Richard Siani; Mike Law; Jane Bahry; and Michael Morrison.

The parties stipulated to the admission into evidence of the following exhibits: 3, 6, 7, 14 through 19, 23, 27 through 29 and 31. On the ALJ's own motion, respondent's exhibit 8 was admitted into evidence.

Respondent's exhibits 1, 5, 10, 24, 32, 35, 37 through 39 were admitted into evidence without objection. Respondent's exhibits 4, 11 through 13, 21, 30, 36, 41 through 43 and 47 were admitted into evidence over objection.

Complainant's exhibits A, C, D, F through H and L through N were admitted into evidence without objection. Complainant's exhibit E

was admitted into evidence over objection. Complainant's exhibit K was not admitted into evidence. Complainant's exhibits B and J were marked but were not offered into evidence.

MATTER APPEALED

Complainant appeals the termination of his employment.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed.

2. Whether the conduct proven to have occurred constitutes violation of State Personnel Board Rule, R8-3-3(A).

3. Whether the decision to terminate complainant's employment was arbitrary, capricious, contrary to rule or law or in violation of the provision of the Whistleblower Act, section 24-50.5-101, et. seq., C.R.S. (1988 Repl. Vol. 10B).

PRELIMINARY MATTERS

1. Complainant's July 17, 1995, appeal alleged that his wrongful termination was in retaliation for his disclosure of information. On July 25, 1995, complainant's allegations of retaliation were referred to the Office of the State Personnel Director for investigation. On October 23, 1995, the State Personnel Director concluded the investigation of complainant's allegations finding that there was "no reasonable basis" to credit them.

Complainant filed a timely appeal of the Director's determination of "no reasonable basis" to credit the claims of retaliation based on the disclosure of information.

2. Respondent's December 11, 1995, motion to quash a subpoena served on JoAnna Miller was granted. The subpoena was not properly served nor could JoAnna Miller provide relevant testimony.

FINDINGS OF FACT

1. Complainant, David Van Dyke (Van Dyke), was employed by the University of Colorado at Boulder (University), in the occupational safety and training unit of the environmental health and safety department (department). He worked under the supervision of Doretta Hultquist (Hultquist), safety specialist III at the time relevant to this appeal. The appointing authority for Van Dyke's position is Azmi P. Imad (Imad), the director of the department.

2. Van Dyke was employed in the position of safety specialist II from May 21, 1990, to July 6, 1995. In this capacity from May, 1990 to May, 1994, Van Dyke had lead worker responsibility. Van Dyke's primary duties included the following: he assisted in the design and implementation of a campus wide laboratory, shop, stockroom, darkroom and storage area safety program; he conducted inspections, audits and surveys of University safety equipment; he acted as coordinator of equipment removal and repair; he evaluated data and made written and/or verbal recommendations for corrective measures to be taken to ensure compliance with University health and safety policies and procedures, and federal, state and local regulations, standards and guidelines; he assisted in the determination and application of University policies and procedure and federal and state law to ensure University compliance with environmental, occupational, health and safety requirements; he assisted in the preparation and presentation of safety training programs; and he responded to request for safety information, complaints and emergencies.

3. Beginning in May, 1994, Hultquist removed Van Dyke's lead worker responsibilities because of his continuous insubordination and unacceptable leadership role.

4. Van Dyke vehemently objected to the department's approach in carrying out its mission in the field of environmental health and safety. Imad worked cooperatively with University departments to remedy safety violations. He instructed those under his supervision to do likewise.

5. Van Dyke had a philosophical difference with the department managers about how the department should operate. Van Dyke viewed his role of safety inspector as one of an enforcer of policies, procedures, regulations and law. He did not want to work with the department personnel to remedy safety violations. He wanted the authority to give orders, cite departments for violations and take enforcement action. Van Dyke believed that because the role of enforcer was not taken in the department, the safety and well being of individuals and structures on campus were placed in jeopardy.

6. Van Dyke was assertive to the point of rudeness with personnel in the departments where he was assigned to monitor safety violations. Van Dyke mistook the department's efforts at working cooperatively as a sign of lax enforcement and sloppy execution of the department's safety mission.

7. Van Dyke maintained that the department managers were overlooking or hiding safety violations. He claimed that Imad forbade the department staff to tell the truth to safety inspectors from federal and local governmental agencies.

8. To the contrary, Imad and the other department managers are highly skilled and trained professionals who have extensive experience in the field of safety, fire protection engineering and professional engineering. While there was evidence of significant interpersonal conflicts within the department, there was no evidence of hidden safety violations or overlooked violations which threatened life or property.

9. Van Dyke's differences with department managers were aggravated by the supervisors' style of management. Personality conflicts were rampant among the staff. Imad is viewed by many department staff members and managers as having a dictatorial management style. Imad was frequently heard to raise his voice in addressing subordinates, occasionally using profanity to address them and bringing male staff members to tears as a result of his abrasive style.

10. Van Dyke believed that because of Imad's management practices, his own insubordinate and abrasive behavior was acceptable. He believed he was emulating Imad's communication techniques. However, unlike Imad, who appeared to have good relationships with some of his subordinates, Van Dyke consistently engaged in inappropriate behavior with his supervisor and co-workers.

11. Even Van Dyke's colleagues who appeared at hearing to testify about Van Dyke's interest, initiative and conscientious effort in the performance of his job duties, stated that they had been witness to his outbursts in the work place and acknowledged that inappropriateness of his behavior. Co-workers and Hultquist were intimidated and threatened by his behavior when he slammed doors in the office and yelled at them in a loud voice.

12. Beginning in or around 1993, in response to Van Dyke's abrasive and insubordinate behavior, Hultquist and Imad imposed corrective actions on two occasions and counselled Van Dyke repeatedly. The counsellings were often formalized in "informational letters". During 1994 and 1995, Van Dyke received eight "informational letters" which concerned his insubordinate, belligerent and argumentative behavior toward work related directives.

13. During this period, Van Dyke was also given an interim performance appraisal with an overall rating of "needs improvement". Van Dyke also received other more favorable job performance ratings which contained narratives about the need for Van Dyke to control his temper and improve his interpersonal relationships.

14. A corrective action dated February 22, 1994, advised him, "You will control your temper at all times. You will utilize

tack, diplomacy, and patience and be respectful, courteous and professional in all interpersonal relations with your supervisor, unit and department employees, campus community, at seminars, etc. . . . "

15. A corrective action dated October 27, 1994, was administered because Van Dyke received an interim job performance rating of "needs improvement". The corrective action stated that the areas that needed improvement were: "Management; Occupational/ Professional Competence; Problem Analysis and Decision Making; Planning, Organizing and Coordination; Organizational Commitment and Adaptability; Communication; and Interpersonal Relations."

16. Van Dyke's conduct did not improve as a result of the corrective actions and counselling. By memorandum dated December 7, 1994, Imad gave Van Dyke notice of a Board Rule, R8-3-3 meeting to be held with him to consider whether to impose disciplinary action for violation of the February, 1994, corrective action. The meeting was scheduled for December 14, 1994.

17. On December 8, 1994, Van Dyke requested an extended leave and received a postponement of the R8-3-3 meeting. Department managers believed that he was applying for short term disability leave. Van Dyke returned to full time work in April, 1995.

18. Van Dyke's job performance was improved during the period from April to June 1995. However, on June 7, 1995, Van Dyke refused to perform a job assignment given to him by Hultquist. Hultquist wrote to Van Dyke documenting his failure to perform his assigned work, referring to his "unacceptable and unprofessional behavior."

19. On June 16, 1995, Van Dyke again engaged in unacceptable and unprofessional behavior. On this occasion, he yelled to Hultquist that "I hope you go to jail." and "So you're starting it again. I thought you learned from the last time."

20. As a result of the two incidents on June 7 and 16, 1995, and Van Dyke's long history of inappropriate behavior, Imad scheduled a R8-3-3 meeting with Van Dyke. The meeting was held on July 5, 1995. Present at the meeting were Van Dyke, his representative, Cheryl Hutcheson, Hultquist, Imad and Elvira Strehle Henson, assistant university counsel.

21. The R8-3-3 meeting notice advised Van Dyke that disciplinary action was being contemplated because of the June, 1995, incidents, and because of Van Dyke's employment history which included numerous other incidents of inappropriate behavior.

22. Following the R8-3-3 meeting by memorandum dated July 6, 1995, Imad terminated Van Dyke's employment due to his

insubordinate behavior.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on Respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen , 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

This case rests in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the Administrative Law Judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987); Barrett v. University of Colorado Health Science Center, 851 P.2d 258 (Colo. App. 1993).

The Whistleblower Act, supra, provides protection from adverse action by the appointing authority for the disclosure of certain types of information. Section 24-50.5-101, C.R.S., provides:

> The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in government authority and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official.

Section 24-50.5-103(1) and (2) provide:

> (1) Except as provided in subsection (2) of this section, no appointing authority or supervisor shall initiate or administer any disciplinary action against an employee on account of the employee's disclosure of information . . .
>
> (2) It shall be the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of the disclosure.

In determining whether the protection provided by the Whistleblower Act has been violated, the complainant must establish that his disclosure fell within the protection of the statute and that the disclosure was a substantial motivating factor in the appointing authority's decision to terminate his employment. If complainant makes this initial showing, then respondent must establish by preponderant evidence that it would have reached the same decision even in the absence of the protected conduct. Ward v. Industrial Commission, 600 P.2d 960 (Colo. 1985).

Respondent contends that complainant's termination from employment was based on his insubordinate and inappropriate conduct. It further contends that there was no evidence presented that complainant's termination from employment was due to his disclosure of information. Respondent further contends that since complainant had been corrected on two prior occasions and had been repeatedly counselled about his conduct, it was neither arbitrary, capricious nor contrary to rule or law in June, 1995, to terminate his employment.

Complainant contends that the evidence presented at hearing established that the respondent's decision to terminate his employment was due to his disclosure of information. Complainant attempted at hearing to air the complaints of disgruntled employees in the department. The bulk of complainant's case consisted of the testimony of his co-workers about their perceived mistreatment by Imad. At the heart of complainant's case is the contention that if Imad engaged in rude and obnoxious behavior, then complainant can be excused for his actions.

The evidence presented at hearing failed to established that complainant's termination from employment was in retaliation for the disclosure of information. The evidence established that it was complainant's insubordinate and belligerent behavior over a two and one half year period which was the reason for

complainant's termination from employment. Complainant cannot hide behind the action of his appointing authority to provide him an excuse for his action. There was no difference in philosophy on safety issues or on management styles that provides justification for complainant's action.

The record is replete with evidence that complainant engaged in the conduct for which discipline was imposed. The testimony of both the parties' witnesses established that complainant engaged in outburst of temper that caused his supervisor and co-workers to fear for their safety and created a hostile and unworkable environment. This conduct violated the State Personnel Board Rule, R8-3-3(A), to the extent that complainant's conduct was shown to be wilful misconduct and a failure to comply with standards of efficient service and competence.

After counselling complainant repeatedly, and imposing two corrective actions and a "needs improvement" performance rating, it was neither arbitrary, capricious nor contrary to rule or law to terminate complainant's employment, when in June, 1995, complainant again engaged in insubordinate and inappropriate conduct.

CONCLUSIONS OF LAW

1. Complainant engaged in the acts for which discipline was imposed.

2. Complainant's conduct constituted violation of State Personnel Board Rule, R8-3-3(A), in that it was shown to be wilful misconduct and a failure to comply with standards of efficient service and competence.

3. The decision to terminate complainant's employment was neither arbitrary, capricious nor contrary to rule or law.

4. There was no evidence presented at hearing that established that complainant was terminated in violation of the Whistleblower Act.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this _____ day of June, 1996, at Denver, Colorado

_____
Margot Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on this _____ day of June, 1996, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

David Van Dyke
1400 Willow Street
Denver, CO 80220

and in the interagency mail, addressed as follows:

Elvira Strehle Henson, Esq.
Office of University Counsel
University of Colorado at Boulder
Campus Box 13, Regent Hall #203
Boulder, CO 80309-0013

_____

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **$50.00**. Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the

date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.